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IN THE SUPREME COURT
OF THE UNITED STATES

In the Matter of the Marriage of		
HAROLD S. SHEPHERD	)	ON
	)	PETITION
Petitioner	)	FOR
	)	WRIT OF
	)	CERTIORARI
	)	FROM THE
	)	SUPREME
	)	COURT OF
	)	THE STATE
And	)	OF OREGON
	)	
SUSAN H.F. SHEPHERD, nka	)	
Susan Finch, aka	)	
	)	
Respondent	)	

PETITION FOR WRIT OF CERTIORARI

Harold Shepherd
P.O. Box 331
Moab, UT 84532
(541) 377-0960
Appearing Pro Se

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I. QUESTIONS PRESENTED

a. Whether the granting of the Fee Request Violates Petitioner's Constitutional Rights.

b. Whether the Order Denying Review and Appellate Judgments violated Petitioner's Constitutional Rights due to the Court of Appeal's granting of wife's Motion for Extension of Time and Motion for Relief from Default prior to the filing of Petitioner's Motion to Deny Motion for Extension of Time and Motion for Default and the Court of Appeal's failure to rule on Petitioner's Motion for Reconsideration.

c. Whether, the Order Denying Review and Appellate Judgments violated Petitioner's constitutional rights by erring in construing or applying the law by failing to dismiss the Petition for failure to file under the proper statute.

d. Whether, the Order Denying Review and Appellate Judgments violated Petitioner's constitutional rights erred in construing or applying the law by failing to address mandatory statutory standards prior granting the Petition.

e. Whether, the Order Denying Review and Appellate Judgments violated Petitioner's constitutional rights by erring in construing or applying the law by determining that the Fees requested in the Petition were reasonable.

f. Whether the Order Denying Review and Appellate Judgments violated Petitioner's constitutional rights by erring in failing to rule on Petitioner's Motion for Default.

g. Whether the Order Denying Review and Appellate Judgments violated Petitioner's constitutional rights by erring in construing or applying the law by failing to address Petitioner's argument that Wife's improperly filed her Motion for Relief From Default.

h. Whether the Order Denying Review and Appellate Judgments violated Petitioner's constitutional rights by failing to make a determination on Petitioner's request for extension to respond to the Letter from the Appellate Commissioner.

i. Whether the Order Denying Review and Appellate Judgments violated Petitioner's constitutional rights by determining that Petitioner's Former Attorney was Petitioner's Agent for purpose of service of the NOA.

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II. CITATIONS OF OFFICIAL AND UNOFFICIAL REPORTS OF OPINIONS AND ORDERS ENTERED BY COURTS OR ADMINISTRATIVE AGENCIES

a. Shepherd and Shepherd, Appellate Judgment and Supplemental Judgment, Court of Appeals of the State of Oregon, A138344 (August 13, 2009).

b. Shepherd and Shepherd, Order Denying Review Supreme Court of the State of Oregon, S057209 (June 4, 2009).

c. Shepherd and Shepherd, Order Denying Request for Stay and Awarding Attorney Fees and Costs, Court of Appeals of the State of Oregon, A138344 (March 2, 2009).

d. Shepherd and Shepherd, Order Granting Motion for Extension of Time, Court of Appeals of the State of Oregon, A138344 (December 16, 2009).

e. Shepherd and Shepherd, James W. Nass, Appellate Commissioner Letter to Laura B. Rufolo and Harold S. Shepherd, Court of Appeals of the State of Oregon, A138344 (November 12, 2009).

f. Shepherd and Shepherd, Order Denying Reconsideration, Court of Appeals of the State of Oregon, A138344 (September 23, 2008).

g. Shepherd and Shepherd, Order Granting Respondent's Motion to Dismiss, Court of Appeals of the State of Oregon, A138344 (June 20, 2008).

III. BASIS FOR JURISDICTION IN THE SUPREME COURT

The date that the Oregon Supreme Court Order sought to be reviewed in this matter was entered is June 4, 2009 (Order Denying Review). (See, Appendix 1) and the Oregon Court of Appeals Appellate Judgment and Supplemental Judgment was entered on August 13, 2009 (Appellate Judgments). (See, Appendix 7). Petitioner requests that this court review such Order and Appellate Judgments and certain deprivations by the Oregon Supreme Court acting under color of state law, of certain rights secured to the plaintiffs as alleged herein under the United States Constitution. This Court has jurisdiction pursuant to 28 U.S.C. § 1257 and Rule 10 of the Rules of the Supreme Court of the United States.

IV. THE CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCES, AND REGULATIONS INVOLVED IN THE CASE

The Constitutional provisions and statutes involved in this case are as follows:

a. The Due Process Clause of the Fourteenth to Amendment to the United States Constitution which states:..."No state shall make or enforce any law

which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty, or the property, without due process of law;"

b. The Equal Protection Clause of the Fourteenth Amendment, United States Constitution which provides that no state shall "...deny to any person within its jurisdiction the equal protection of the laws."

c. The Ninth Amendment to the United States Constitution which states "The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people."

V. STATEMENT OF THE CASE

In October 2007, Petitioner who currently resides in Moab, Utah, filed a Motion for Modification in the Multnomah County Circuit Court, in part, requesting 8 weeks of parenting time during the summer months with his children Anna age 15 and Alexander age 12 who currently reside with Respondent in Portland, Oregon. Following hearing on the Motion, held on June 20, 2007, the court denied Petitioner's request and issued a Supplemental judgment awarding Petitioner a total of 36 days of parenting time during the summer months, 7 days during each Spring Break, and half of Christmas break. Supplemental Judgment RE: Modification of Parenting Time (February 13, 2008).

In March 2008, Petitioner filed a timely Notice of Appeal of the Supplemental Judgment with the

Oregon Court of Appeals (Court of Appeals) but, inadvertently, mailed Respondent's required copy to the wrong address for Respondent's attorney. In April 2008, Respondent filed a Motion to Dismiss alleging improper service based on a failure to timely serve the NOA on her attorney[1] and in May 2008, Petitioner filed a Response to the Motion. Never-the-less, the Court of Appeals granted Respondent's Motion to Dismiss by Order dated June 20, 2008. (Appendix 2). Petitioner filed a timely Request for Reconsideration in June 2008 and the Court of Appeals denied the request by order dated September 23, 2008. (Appendix 3).

Thereafter, July 10, 2008, Respondent filed a Petition for Attorneys Fees and Request for Findings Under ORAP 13.107(7) (Fee Request) and on July 23, 2008 Petitioner filed a response to the Fee Request (Fee Request Response) stating in part that attorneys fees could were not available in this case because Petitioner recently filed under Chapter 13 of the United States Bankruptcy Code.

On November 21, 2008 Petitioner received a letter from James W. Nass, the Oregon Appellate Commissioner dated November 12, 2008 (Letter) (Appendix 4) directing that, directed Petitioner to provide information regarding the current status of the bankruptcy proceedings and that both Parties provide their positions as to the affect of the

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[1] Regardless of having the improper address, the NOA was forwarded to Respondent's attorney who allegedly received it one day after the deadline to file the NOA.

bankruptcy proceedings on the appeal. Petitioner filed a Response to the Letter (Petitioner's Response) attaching documentation describing the current status of Petitioner's bankruptcy and Petitioner's opinion as to the applicability of the federal Bankruptcy Court jurisdiction to Respondent's request for attorney's fees. The Letter stated that Respondent would have two weeks to file a Response to Petitioner's Response (Respondent's Response).

On November 26, 2008, Petitioner filed his Response to the Letter along with a Motion for Extension of time to file Petitioner's Response based on the fact that he had not received the Letter until 3 days prior to the stated due date and did not have adequate time to file the Response within the prescribed deadline.

On December 9, one day prior to the deadline for filing Respondent's Response to the Letter, Respondent filed a "Motion for Extension of Time-File Response" asking for "28 days, from December 10, 2008 through January 7, 2008, within which to serve and file the Respondent on reviews response to the petition for review in this case." Motion for Extension of Time-File Response at 1. The Motion, however, was captioned and filed in the Oregon Supreme Court rather than the proper Oregon Court of Appeals. Id.

On December 12, 2008, Respondent filed another "Motion for Extension of Time- File Response" together with a "Motion-Relief from Default" asking for "an order granting her relief from

default and extending the time in which to file a response to Petitioner's response to the November 12, 2008 letter from the Appellate Commissioner, "from December 10, 2008 through January 7, 2008." Motion for Extension of Time-Relief from Default at 1. Respondent stated that "[d]ue to an internal error Respondent on review's Motion for Extension of Time—File Response to Petition for Review was inadvertently filed rather than the enclosed document" and asking the court to "withdraw Respondent on review's Motion for Extension of Time–File Response to Petition for Review." Laura B. Rufolo letter to Kingsley Click State Court Administrator (December 12, 2008).

On December 16, 2008, the Commissioner Nass granted Respondent's Motion for Extension of time and for Relief from Default. (Appendix 5) Neither Commissioner Nass nor the Court of Appeals, however, ever ruled on Petitioner's Motion for Extension of time regarding his Response to the Letter.

On December 20, 2008, pursuant to ORAP 6.25(1)(b), Petitioner filed a Motion for Default (Motion for Default) requesting that the Court find Respondent in Default for filing her Motion for Extension of Time and Relief from Default after the deadline provided by Commissioner Nass for filing the Response.

Without ruling on Petitioner's Motion for Default, on March 2, 2009, the Court of Appeals issued an Order Denying Petitioner's Request to Stay

and Awarding Attorney's Fees and Costs (Order Denying Stay and Awarding Fees). (Appendix 6). On December 29, 2009, Petitioner filed a Petition for Reconsideration requesting that the Court of Appeals reconsider its Order Granting Respondent's Motion for Extension of Time and for Relief from Default but the Court of Appeals never ruled on the Petition. On April 4, 2009, Petitioner filed a Petition for Review in the Oregon Supreme Court and the Court denied review by Order dated June 4, 2009 (Order Denying Review). (Appendix iv). Finally, on August 13, 2009, the Court of Appeals issued an "Appellate Judgment and Supplemental Judgment and Supplemental Judgment" awarding Respondent Attorneys fees in the amount of $3,009.98. (Appendix 7).

Based on the fact that the federal question sought to be reviewed in this Petition was arises out of the granting of attorney's fees by the Oregon Court Appeals, the court of first instance in this case is the Court of Appeals.

Petitioner, therefore, first raised the constitutional issues for which he is asking federal review in the Court of Appeals. In this context, Petitioner referred to the arguments included in his Response to the Motion to Dismiss and Motion for Reconsideration of the Courts Dismissal of the Original appeal in June, 2008 including:

> the Court, may not authorize costs against Husband when it has established service standard which is all but impossible to meet, Husband's former attorney is not his agent

> in this case, there is no 30 day time period for service on Wife, the Court would throw out Husband's entire appear when no prejudice to respondent has been shown, and Dismissing Husband's appeal is in violation of his due process rights and not in the best interest of the children in this matter. Indeed the allowance of attorney's fees in this matter would be further violation of Husband's constitutional rights by essentially punishing him for raising legitimate claims against an illegal court order which prevents Husband from exercising his parental rights in the best interest of his children.

Petitioner/Appellants Response to Respondent's Petition for Attorney's Fees and Request for Findings at 7-8.

Petitioner next sought review of the issues giving raise to the federal question in his Motion for Default in relation to Respondents delinquent Response to the Letter by asking the Court of Appeals to find Respondent in default for filing her Motion for Extension of Time and Relief from Default after the deadline provided by Commissioner Nass for filing the Response. Motion for Default p. 2-4. Neither Commissioner Nass nor the Court of Appeals, however, ever ruled on Petitioner's Motion for Default.[2]

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[2] The Court of Appeals never ruled on the Motion for Default or any of the motions petitioner filed in regards to the appeal.

Petitioner next sought review of the issues giving raise to the federal question in his Petitioner for Reconsideration of the Court of Appeals Order Granting Respondent's Motion for Extension of Time and for Relief from Default in relation to the Letter but the Court of Appeals never ruled on the Petition. In that context Petitioner argued that The Court's Order erred in both law and facts, to the extent that it granted Respondent's Motion for Extension of Time and Relief from Default before Petitioner filed the Motion for Default and therefore did not have all the facts and legal arguments before it when it granted the Motion for Extension of Time and Relief from Default. In addition, although the Court of Appeals granted Respondent's Motion for Extension of Time and Relief from Default, it never granted Petitioner's request for extension. Based on the fact, therefore, that Respondent's Motion for Extension of Time was conditioned on the assumption that Petitioner's Motion for Extension would be granted; the Appeals Court had no basis for granting the Motion for Extension of Time without granting Petitioner's Motion for Extension. Petition for Reconsideration p. 3-4.

Petitioner next sought review of the issues giving raise to the federal question in his Petition for Review in the Oregon Supreme Court. In that context Petitioner argued that the Court's Order errors in both law and facts, to the extent that it granted Respondent's Motion for Extension of Time and Relief from Default before Petitioner filed the Motion for Default and therefore did not have all the

facts and legal arguments before it when it granted the Motion for Extension of Time and Relief from Default. In addition, although the court granted Respondent's Motion for Extension of Time and Relief from Default, it never granted Petitioner's request for extension. Based on the fact, therefore, that Respondent's Motion for Extension of Time was conditioned on the assumption that Petitioner's Motion for Extension would be granted, the Appeals Court had no basis for granting the Motion for Extension of Time without granting Petitioner's Motion for Extension. Petitioner further argued that the Court of Appeals, therefore, should have revoked the Order Granting Respondent's Motion for Extension of Time-File Response Letter and Motion-Relief from Default until such time as it made a decision on Petitioner's Motion for Extension of Time to Respond to the Letter from the Appellate Commissioner. Once the Appeals Court made a decision on Petitioner's Motion for Extension, if such motion was granted, it should have reviewed Respondent's Motion for Extension of Time and Relief from Default and Petitioner's Motion for Default and found Respondent in default in relation to her response to Petitioner's response to the November 12, 2008 letter from the Appellate Commissioner as the Court was without discretion to grant the Motion for Extension of Time and Relief from Default. Petition for Review p. 4-5. The Oregon Supreme Court issued it's denial of review without opinion or comment including regarding Petitioner's

arguments regarding the Motions for Default and for Extension of Time.

Further, in his Petition for Review to the Oregon Supreme Court Petitioner argued that the Court of Appeal's failure to dismiss the Fee Request after Respondent failed to cite the proper statute and other procedural violations made by Respondent directly contradicts Oregon statutory and case law regarding domestic relations. Petition for Review p. 5-6. In addition, the Courts failure to make a decision on any of Petitioner's motions in relation to the fee request and the Administrator's Letter directly contradicts the Oregon Rules of Appellate Procedure and existing case law. Petition for Review p. 7-9. Finally, the Court of Appeals completely ignored the criteria it must evaluate in determining whether to grant Attorneys fees and how much of such requested fees to authorize in direct violation of Oregon case law and statutory criteria. Petition for Review p. 10-13.

Finally, Petitioner sought review of the issues giving raise to the federal question in the Oregon Supreme Court by pointing out that in granting the attorneys fees request the Court of Appeals ignored Petitioner's argument that the allowance of costs in this matter is a further violation of Petitioner's Constitutional rights by essentially punishing him for raising legitimate claims against an illegal court order, which prevents Petitioner from exercising his parental rights in the best interest of his children. Petitioner argued that by acting under color of state

law in throwing out Petitioner's entire appeal because of an alleged service violation in which Respondent alleges that her attorney in the original matter was served only one day late, the Court of Appeal's Order in this case is, therefore, in violation of certain rights secured to Petitioner under the United States Constitution. Petition for Review at 13-14.

That the federal question was timely and properly raised and that this Court has jurisdiction to review the judgment on a writ of certiorari, is illustrated by the fact that, if left to stand, therefore, the Oregon Supreme Court Order and the Orders and Judgments of the Oregon Court of Appeals stand in contrast to existing precedent, statutes and procedural rules regarding domestic relations matters and will encourage the Appeals Court and other state courts to ignore basic procedural and statutory standards established to protect the due process and equal protection rights of Petitioners and other parties who seek the protection of such basic rights. The clear violations of Petitioner's constitutional and civil rights, are further illustrated by the State Courts eagerness to dismiss Petitioner's entire appeal due to a minor procedural violation when Respondent was clearly not prejudiced by such violation, while at the same time not only ignoring similar procedural violations when committed by Respondent, but failing to rule on Petitioner's Motions while granting each and every motion filed by Respondent. This can only be interpreted as the Oregon Courts' clear desire to maintain the

attorney's fee industry and the status quo in Oregon family law matters at the expense of the fundamental rights of Petitioner.

VI. ARGUMENT

a. The State Court has decided an Important Question of Federal Law

1. Violation of Petitioner's Rights to Due Process Under the 14th Amendment to the United States Constitution.

If left to stand, the Oregon Supreme Court Order Denying Review and Appellate Judgments would be in contrast to existing precedent, statutes and procedural rules regarding civil rights and domestic relations matters and will encourage the Appeals Court and other state courts to ignore basic procedural and statutory standards established to protect the due process under the 14th Amendment to the United States Constitution of Petitioners and other parties who seek the protection of such basic rights.

This Court, for example, "has frequently emphasized the importance of the family. The rights to conceive and to raise one's children have been deemed essential, * * * basic civil rights of man, * * * and rights far more precious than property rights. * * * It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor

hinder." Stanley V. Illinois, 405 U.S. 645; 651 31 L Ed 2d 551 (1972).

In the past, the Court of Appeals has confirmed the 14th Amendment's protection of the relationship between Petitioners relationship and their children. In In re Marriage of of Winczewski, for example, the Court observed that, in this context, the U.S. Supreme Court:

> ...has frequently emphasized the importance of the family. The rights to conceive and to raise one's children have been deemed 'essential,' [and] 'basic civil rights of man,' * * *. The integrity of the family unit has found protection in the Due Process Clause of the Fourteenth Amendment, the Equal Protection Clause of the Fourteenth Amendment, and the Ninth Amendment. 405 US at 651 (citations omitted).

188 Or. App. 667, 726, 72 P.3d 1012, 1071 (November 30, 1989).

The Order violates Petitioner's Due Process Rights in the following specific manner:

i. The Fee Request Was Filed Under the Improper Statute

In response to Petitioner's argument that, while the Petition claims that "Mother is entitled to a reasonable attorney fee under the terms of ORS 20.310 and ORS 107.105(5)", p. 2, ORS 107.105(5) does not award of costs, disbursements and attorney

fees address suits for which an appeal is taken of a judgment, as in this case, on Parenting Time but instead addresses "annulment or dissolution of a marriage or for separation." See, Fee Request Response p. 1, the Court of Appeals provides that "Fees may be awarded in this matter, because the judgment was entered in the party's dissolution suit." Order Denying Stay and Awarding Fees p. 2. (emphasis added). The court, however, sites no authority for the argument that the word "in", in this case, refers to the underlying suit for dissolution of marriage filed a decade earlier instead of the current matter which at no time addressed "annulment or dissolution of a marriage or for separation." The importance of this distinction is illustrated by the fact that if the legislature had intended for ORS 107.105(5) to apply to suits involving parenting time, it would have simply included the term "parenting time" in that statute.

The significance of the Court of Appeal's failure to recognize the distinction between parenting time and "annulment or separation" in its interpretation of ORS 107.105(5) is illustrated by the intended purpose of awarding attorneys fees to discourage parties from asserting meritless claims or defenses. See e.g., ORS 20.075(1)(d). While the Oregon legislature may have intended to award fees in suits involving other aspects of annulment or separation which that potentially involve meritless claims or defenses, it is difficult to argue that, as in this case, a parents desire to spend adequate time with his children involves a meritless claim or

defense.

In addition, attorneys' fees in annulment or separation matters may be authorized only once the Court has reviewed the criteria listed under ORS 20.075 for a fee request that is authorized by statute. "A court shall consider the following factors in determining whether to award attorney fees in any case in which an award of attorney fees is authorized by statute." (emphasis added). ORS 20.075(1). See also, ORS 20.075(2) ("A court shall consider the factors specified in subsection (1) of this section in determining the amount of an award of attorney fees in any case in which an award of attorney fees is authorized or required by statute."). See, Fee Request Response p. 2. Based on the fact, therefore, that Respondent has failed to site any statute authorizing attorney fees applicable to this matter, the Court of Appeals has no basis for considering the mandatory factors provided in ORS 20.075.

The precedent for denying the Petition based on the failure to site the proper statute is the Court of Appeal's Order of Dismissal, Shepherd and Finch, A138344 (June 20, 2008) and the Court of Appeal's Order Denying Reconsideration (September 23, 2008), in which the Court, in this very same matter, dismissed Petitioner's appeal form the judgment of the Circuit Court because Petitioner served Respondent with the Notice of Appeal one day late. In addition, this case is similar to McCall v. Kulongoski, 339 OR 186, 118 P.3d 256 (2005). In that matter, the state attempted to serve the plaintiffs

with notice of its appeal by mailing a copy to the plaintiffs' legal counsel. In doing so, however, the state sent the document to the wrong address. The notice arrived at the new office on the 32nd day after entry of judgment. This Court determined that, where the state attempted mail service of its notice and failed to send the notice to what it had known for more than a year was the last known address of the plaintiffs' lawyer, the state failed to accomplish service in a manner permitted by statute. As a result, the Oregon Court of Appeals held that the case was properly dismissed by the Court of Appeals for failure to property serve notice. In the present case Respondent has committed similar procedural violations in failing to reference the proper statutes which are necessary for the Court of Appeals to consider mandated factors in determining whether attorney fees are proper and the Court of Appeals was without jurisdiction to grant the Petition.

ii) Failure to Consider the Factors Under ORS 20.075

Under ORS 20.075(1) the Oregon Court of Appeals must "consider [certain] factors in determining whether to award attorney fees in any case in which an award of attorney fees is authorized by statute and in which the court has discretion to decide whether to award attorney fees." See also, McCarthy v. Freeze Dry, Inc., 327 Or. 185, 188, 957 P2d 1200 (1998); Baker and Baker, 173 Or App 33, 20 P3d 263 (2001). The Order Denying Review and Appellate Judgments , however, ignored the fact that

the Court of Appeals failed to address such factors as required by the statute including:

A) "The objective reasonableness of the claims and defenses asserted by the parties...." ORS 20.075(1)(a). The Order Denying Review and Appellate Judgments, however, ignored the fact that the Court of Appeals failed to address Petitioner's argument that both Respondent's Motion to Dismiss and Reply contained important factual inconsistencies and did not comply with the Oregon Rules of Appellate Procedures. See, Fee Request Response p. 2-4.

B) "The extent to which an award of an attorney fee in this case would deter others from asserting meritless claims or defenses." ORS 20.075(1)(d). The Order Denying Review and Appellate Judgments, however, ignored the fact that the Court of Appeals failed to address Petitioner's argument that the Petition was intended to insulate the public from litigation designed to limit public participation in the governmental process and that an award of Attorney's Fees, in this case, will not deter litigants from prosecuting meritless claims and will send an improper message allowing improper retaliation against good faith litigation. See, Response, p. 5; and

C) "The objective reasonableness of the parties and the diligence of the parties in pursuing settlement of the dispute." ORS 20.075(1)(f). The Order Denying Review and Appellate Judgments, however, ignored the fact that the Court of Appeals failed to address Petitioner's argument that, at no

time during the appeal, did Respondent request a settlement from Petitioner. See, Response, p. 5.

Similarly, ORS 20.075(2), provides that, in addition to the criteria listed under ORS 20.075(1), "the court shall consider [additional] factors in determining the amount of an award of attorney fees" in regards to the Petition, cases". See also, McCarthy, 327 Or. 185 at 188. The Order Denying Review and Appellate Judgments, however, ignored the fact that the Court of Appeals completely failed to address such factors as required by the statute including:

D) "The time and labor required in the proceeding..." ORS 20.075(2)(a). The Order Denying Review and Appellate Judgments, however, ignored the fact that the Court of Appeals failed address Petitioner's argument that both the Response and the Reply contained important factual inconsistencies and did not comply with the Oregon Rules of Appellate Procedures. This not only required increased time and labor for Petitioner to respond to these filings but Petitioner should not have to pay attorneys fees for awkwardly drafted pleadings containing factual and procedural errors. See, Response, p. 5.

E) "...the novelty and difficulty of the questions involved..." ORS 20.075(2)(a). The Order Denying Review and Appellate Judgments, however, ignored the fact that the Court of Appeals failed address Petitioner's argument that Respondent cannot, on the one hand, claim that she is entitled to attorney's

fees under ORS 20.075(1)(a) based on the reasonableness of the appeal and then turn around and claim that the appeal presented difficult questions of law. See, Response, p. 5-6.

F) "...skills requisite to perform the legal service properly." ORS 20.075(2)(a).The Order Denying Review and Appellate Judgments, however, ignored the fact that the Court of Appeals failed to address that fact that Respondent cannot on the one hand claim that she is entitled to attorney's fees under ORS 20.075(1)(a) based on the reasonableness of the appeal and then turn around and claim that the appeal presented difficult questions of law. See, Response, p. 6.

That the Order Denying Review and Appellate Judgments erred by ignoring the fact that the Court of Appeals completely failed to address the factors listed in ORS 20.075 is illustrated by this Court's opinion in McCarthy, 327 Or. 185 at 188, which provides that "ORS 20.075(1) lists eight nonexclusive factors that a court must consider in deciding whether to make a discretionary award of fees pursuant to statute. If the court decides, pursuant to subsection (1), to award attorney fees, ORS 20.075(2) requires the court, in deciding the amount of the award, to consider all the factors listed in subsection (1), together with an additional eight factors listed in subsection (2)(a)-(h)." (emphasis added.).

iii. The Fees Requested are Unreasonable

In response to Petitioner's claim that nothing in ORS §20.075 "authorizes the award of an attorney

fee in excess of a reasonable attorney fee." ORS §20.075(4), the Court of Appeals provides that "the time spent by Respondent's attorney and the hourly rate charged are reasonable." Order Denying Stay and Awarding Fees p. 2. The Court, however, completely failed to address the issues regarding the reasonableness of the Petition raised in the Response which were based on the fact that throughout the appeal, Petitioner asked for nothing more than to spend sufficient time with his children to maintain a constitutionally protected parent-child relationship with them and the Notice of Appeal could not have been meritless. See, Fee Request Response p. 7. Further, Petitioner argued that the Petition was filed to intimidate Petitioner into not filing an appeal of the Court's dismissal of his Notice of Appeal and otherwise further pursuing this matter and to deter others from similar good faith actions. Id.

iv. Failure to Consider Factors under ORS 20.310.

ORS 20.310(1)(c) requires the Court to consider "The extent to which an award of an attorney's fee in the case would deter others from asserting good faith claims or defenses in similar cases." The Order, however, failed to address Petitioner's argument that Respondent's claim that the Petition was filed "in order to deter others from asserting meritless claims or defenses" is a misrepresentation of the reason the Petition was filed and that throughout this appeal, Petitioner has

asked for nothing more than to spend sufficient time with his children to maintain a parent-child relationship with them and the Notice of Appeal could not have been meritless. See, Response p. 6.

2. Violation of Petitioner's Rights to Equal Protection of the Law Under the 14th Amendment to the United States Constitution.

The clear violations of Petitioner's constitutional and civil rights, are further illustrated by the State Courts' eagerness to dismiss Petitioner's entire appeal due to a minor procedural violation when Respondent was clearly not prejudiced by such violation, while at the same time not only ignoring similar procedural violations when committed by Respondent, but failing to rule on Petitioner's Motions while granting each and every motion filed by Respondent. This can only be interpreted as the Oregon Courts' clear desire to maintain the attorneys' fee industry and the status quo in Oregon family law matters at the expense of the fundamental rights of Petitioner.

In the Matter of D., Minor Child F. and F., Respondents, v. C., Petitioner, the Court stated "'It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder.' ...The integrity of the family unit has found protection in the Due Process Clause of the Fourteenth Amendment, and the Ninth Amendment..." 24 Or. App. 601, 619 (May 11, 1976),

citing Prince v. Massachusetts, 321 U.S. 158, 166 [88 L.Ed. 645, 652, 64 S.Ct. 438] (1944); Meyer v. Nebraska, supra, at 399 [67 L Ed at 1045], the Equal Protection Clause of the Fourteenth Amendment, Skinner v. Oklahoma, supra, at 541 [86 L Ed at 1660], Griswold v. Connecticut, 381 U.S. 479, 496 [14 L Ed 2d 510, 522, 85 S.Ct. 1678] (1965) (Goldberg, J., concurring)." 405 US at 651.

The Order violates Petitioner's Due Process Rights in the following specific manner:

i. Failure to Address Petitioner's Motion for Default

Default orders and judgments are governed by ORCP 69(A)(1), which provides: "[w]hen a party against whom a judgment for affirmative relief is sought...has failed to plead or otherwise defend as provided in these rules, the party seeking affirmative relief may apply for an order of default." The Court of Appeals, however, ignored Petitioner's properly filed Motion for Default which alleged that Respondent filed her Motion for Extension of Time and Motion for Relief from Default two days after the prescribed deadline provided by the Appellate Commissioner and was erroneously filed in this Court in response to Petitioner's Petition for Review to this Court of the Court of Appeal's Opinion Dated September 23, 2008 which was unrelated to the Petition. Respondent, herself, admitted that the filing deadline for Respondent's Response had lapsed and that her late filing was due "to an internal error" in which "Respondent on review's Motion for Extension of

Time- File Response to Petition for Review was inadvertently filed rather than the enclosed document." Laura B. Rufolo letter to Kingsley Click State Court Administrator (December 12, 2008).

It is clear, therefore, that the default rule applies to Respondent's failure to respond to Petitioner's Response in this matter and the Court of Appeals was not only required to grant Petitioner's Motion for Default, but, to at least, rule on the Motion for Default. The significance of this omission is illustrated by ORCP 69 which provides:

> The commentary to the proposed rule noted that "[t]his rule would apply to anyone required to file a responsive pleading to a claim and to any person who failed to appear and defend at trial." Council on Court Procedures, Oregon Rules of Civil Procedure and Amendments, Preliminary Drafts and Final Draft, Commentary to Draft of Proposed Rules 67-74 at page 40 (October 15, 1979). Moreover, the commentary to the final rule provides, in pertinent part: "This rule is a combination of ORS 18.080 and Federal Rule 55. Under section 69A. all defaults by a party against whom judgment is sought would be covered by this rule. ORS 18.080 referred only to failure to answer. A failure to file responsive pleading, or failure to appear and defend at trial, or an ordered default

> under Rule 46, would be regulated by this rule." Commentary to Rule 69, reprinted in Merrill, Oregon Rules of Civil Procedure: 1990 Handbook 217. (Emphasis supplied.)

Van Dyke v. Varsity Club Inc., 103 Or. App. 99, 103-104; 796 P.2d 382 (September 1990).

It is clear, therefore, that the Court of Appeals was without jurisdiction to review Respondent's Response to Petitioner's Response and should have granted the Motion for Default under the OCRPs which provide "[t]he court or the Clerk upon written application of the party seeking judgment shall enter judgment when the party seeking judgment submits an affidavit or a declaration stating that to the best knowledge and belief of the party seeking judgment, the party against the order of default is sought is not incapacitated as defined in ORS 125.005, a minor, a protected person as defined in ORS 125.005, or a Respondent as defined in ORS 125.005. " ORCP 69(B)(1)(d) (emphasis added).

The precedent for denial of the Motion for Extension of Time and for Default in this case is the Order of Dismissal, Shepherd and Finch, A138344 (June 20, 2008) and the Court of Appeal's Order Denying Reconsideration (September 23, 2008), in which the Court of Appeal's, in this very same matter, dismissed Petitioner's appeal because Petitioner served Respondent with the Notice of Appeal one day late. In addition, this case is similar to McCall v. Kulongoski, 339 OR 186, 118 P.3d 256

(2005). In that matter, the state attempted to serve the plaintiffs with notice of its appeal by mailing a copy to the plaintiffs' legal counsel. In doing so, however, the state sent the document to the wrong address. The notice arrived at the new office on the 32nd day after entry of judgment. This Court determined that, where the state attempted mail service of its notice and failed to send the notice to what it had known for more than a year was the last known address of the plaintiffs' lawyer, the state failed to accomplish service in a manner permitted by statute. As a result, the Supreme Court held that the case was properly dismissed by the Court of Appeals for failure to property serve notice. In the present case Respondent has committed similar procedural violations in failing to file Respondent's Response on time and in the proper court.

ii. Failure to Address Improper Filing for Relief From Default.

The Court of Appeals failed to address Petitioner's argument that Respondent requests that the Court relieve her from default for failing to file her Response to Petitioner's Response within the time period required by the Commission's letter. Respondent, however, completely failed to mention ORCP 69, which is the proper provision under which to request a relief from a default order. "For good cause shown, the court may set aside an order of default." ORCP 69(c)."[1] This case is similar to Ballard v. City of Albany, 221 Or. App. 630, 191 P.3d 679, (2008); which found that movants must follow

the procedures under ORCP 71 when requesting relief which is the only means by which the court may determine whether movant has presented "reasonable grounds excusing his default." Id at 637. If reasonable grounds are not found for the default, then the court "does not abuse its discretion in denying the motion to set aside the limited judgment in favor of the city and county." Id. Under Ballard, therefore, the Court of Appeals should have denied Respondent's Motion for Extension of Time and the Court should have found her find her in default in relation to her response to Petitioner's response to the November 12, 2008 letter from the Appellate Commissioner as the Court is without discretion to grant to hear Respondent's Response.

iii. Failure to Consider Petitioner's Motion for Extension

Although the Court of Appeals granted the Motion for Extension of Time and Motion for Relief from Default, it has yet to grant Petitioner's request for extension. Based on the fact, therefore, that the Letter required Respondent to respond within two weeks after Petitioner filed his Response, Respondent cannot file her Response until Petitioner has filed his. Until Respondent can legally file a response, therefore, there is no basis for filing a Motion for Extension of Time or MRD.

3. The State Court has decided an Important Federal Question in a Way that Conflicts with Relevant Decision of This Court

The clear violations of Petitioner's constitutional and civil rights, are further illustrated by the State Courts' eagerness to dismiss Petitioner's entire appeal due to a minor procedural violation when Respondent was clearly not prejudiced by such violation, while at the same time not only ignoring similar procedural violations when committed by Respondent, but failing to rule on Petitioner's Motions while granting each and every motion filed by Respondent. This can only be interpreted as the Oregon Courts' clear desire to maintain the attorneys' fee industry and the status quo in Oregon family law matters at the expense of the fundamental rights of Petitioner.

As in this case, this Court will reverse biased decisions by state courts in order to protect the principles of Due Process:

> ...this Court has also identified additional instances which, as an objective matter, require recusal where "the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable.... [T]the question is whether, 'under a realistic appraisal of psychological tendencies and human weakness,' the interest "poses such a risk of actual bias or prejudgment that the practice must be forbidden if the guarantee of due process is to be adequately implemented.'

Caperton v. A.T. Massey Coal, Co. 129 S. Ct. 2252, 2252-2253, (2009), citing Withrow v. Larken, 421 U. S., 35, 47.

3. The Order Denying Review and Appellate Judgments Would Have a Chilling Effect on Future Civil Rights and Family Law Litigation

The Order and Judgments ignore Petitioner's argument that the allowance of costs and fees in this matter is a further violation of Petitioner's constitutional rights by essentially punishing him for raising legitimate claims against an illegal court order which prevents Petitioner from exercising his parental rights in the best interest of his children. See e.g., Wisconsin v. Yoder, 406 U.S. 205, 92 S.Ct. 1526, 32 L Ed 2d 15 (1972), (holding a statute unconstitutional that required parents to keep their children in school until the age of 16). The Yoder Court explained, "The history and culture of Western civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children. This primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition." 406 US at 232.

By acting under color of state law in throwing out Petitioner's entire appeal because of an alleged service violation in which Respondent alleges that her attorney in the original matter was served only one day late, the Order in this case, therefore, is in further violation of Petitioner's rights under the 14th Amendment. This case is similar to Larry Bowoto, et

al v. Chevron Corporation, No. C99-02506 SI, N. Dist. California (April 22, 2009) (Appendix 8), in which the Court dismissed a claim for damages against Chevron filed by but denied Chevron's request for attorneys fees against the Plaintiffs who consisted of several Nigerian villagers. In dismissing the fee request the Court said:

> ...the Court finds that awarding costs to defendants in this case would have a "chilling effect . . . on future civil rights litigants." Stanley, 178 F.3d at 1079. At root, this case was an attempt by impoverished citizens of Nigeria to increase accountability for the activities of American companies in their country. Plaintiffs' ultimate failure at trial does not detract from the fact that this was a civil rights case. The threat of deterring future litigants from prosecuting human rights claims in the future is especially present in a case such as this, where plaintiffs have paltry resources and defendants are large and powerful economic actors.

Id. at 3.

CONCLUSION

The Order Denying Review and Appellate Judgments violates Petitioners rights protected under the Due Process and Equal Protection clauses of the 14ht Amendment to the United States Constitution; decides an important, decides an important federal question in a way that conflicts

with relevant decisions of this Court and would have a chilling effect on future civil rights and family law litigation. In addition, that the federal question was timely and properly raised and that this Court has jurisdiction to review the judgment on a writ of certiorari, is illustrated by the fact that, if left to stand, therefore, the Oregon Supreme Court Order and the Orders and Judgments of the Oregon Court of Appeals stand in contrast to existing precedent, statutes and procedural rules regarding fundamental rights, domestic relations matters and will encourage the Appeals Court and other state courts to ignore basic procedural and statutory standards established to protect the due process and equal protection rights of Petitioners and other parties who seek the protection of such basic rights. The clear violations of Petitioner's constitutional and civil rights, are further illustrated by the State Courts clear bias in granting the Attorneys Fee Request.

This court should therefore, accept review of this matter as requested, herein.

Respectfully submitted this 29th day of August, 2009.

Harold Shepherd,
P.O. Box 331, Moab, UT 84532
(541) 377-0960
Petitioner Appearing Pro Se

APPENDIX 1

IN THE SUPREME COURT OF THE STATE OF OREGON

In the Matter of the Marriage of

HAROLD S. SHEPHERD,
Petitioner-Appellant,
Petitioner on Review,

and

SUSAN H.F. SHEPHERD, nka Susan Finch, aka Susan H. Finch,
Respondent-Respondent,
Respondent on Review.

Court of Appeals
A138344

ORDER DENYING REVIEW

REPLIES SHOULD BE DIRECTED TO: State Court Administrator, Records Section
Supreme Court Building, 1163 State Street, Salem, OR 97301-2563

S057209

ORDER DENYING REVIEW

Upon consideration by the court.

The court has considered the petition for review and orders that it be denied.

June 4, 2009
DATE

/s/ Paul J. De Munitz
CHIEF JUSTICE

c: Laura B Rufolo
Harold S. Shepherd

Vb/S057209odpr090604

APPENDIX 2

IN THE COURT OF APPEALS OF THE STATE OF OREGON

In the Matter of the Marriage of

HAROLD S. SHEPHERD,
Petitioner-Appellant,

and

SUSAN H.F. SHEPHERD, nka
Susan Finch, aka Susan H. Finch,
Respondent-Respondent.

Multnomah County Circuit Court
970566040

A138344

ORDER OF DISMISSAL

Respondent ("wife") moves to dismiss the appeal of appellant ("husband") for lack of jurisdiction on the ground that husband failed timely to serve wife with the notice of appeal. ORS 19.240(2)(a) requires such service; ORS 19.270(2)(a) makes such service jurisdictional.

It is undisputed that husband served his notice of appeal by mail addressed to wife's then-attorney at the attorney's former address, an address from which she had moved in October 2006. In a reply to husband's response to her motion to dismiss, wife produced evidence that wife's then-attorney actually received the notice of appeal on the 31st day after the date of entry of judgment.

By letter, husband appears to suggest that the court should disregard that evidence because the Oregon Rules of Appellate Procedure do not provide for filing replies to responses to motions. The Oregon Supreme Court and Court of Appeals have not provided in the Oregon Rules of Appellate Procedure for filing replies to responses to motions because the appellate courts do not want to encourage the filing of replies merely because the rules would provide parties with the opportunity to do so. However, it is the practice of the appellate courts to consider replies, regardless of when field, if received by the court in time to be considered by the court before deciding the motion. Therefore, the court has considered wife's reply and the declaration of wife's former attorney attached thereto. *See, for example, Murrieta v. Brewster*, 328 Or 434, 439, 981 P2d 330 (199) (Supreme Court reversed Court of Appeals dismissal of appeal based on evidence received by the Court of Appeals so belatedly that the Court of Appeals may not have been aware of it when the appeal was dismissed.)

Based on wife's reply, the court determines that wife's former attorney did not actually receive her service copy of the notice of appeal until the 31st day after the date of entry of judgment. As such, wife's then-attorney received her service copy untimely. Nevertheless, husband contends that, under ORCP 9, he timely served wife's attorney by mail because he mailed the notice of appeal to the last address known to him of wife's then-attorney.

The court interprets "last known address" as the address that the party undertaking service knew, or should have discovered if the party had undertaken a reasonable investigation. Husband's former attorney clearly was aware of wife's attorney's then current address. Counsel's knowledge is imputed to husband. *Fleishhacker v. Portland News Pub. Co.* 158 Or 476, 487-88, 77 P2d 141 (1938). Moreover, it is more likely than not that husband's former attorney forwarded to husband copies of materials that were placed in the attorney's file, either as those materials were filed or, at the latest, when husband undertook to represent himself on appeal. The court infers that, had husband undertaken an inspection of those materials, he would have discovered wife's then-attorney's current office address. Lastly, wife's attorney notified the Oregon State Bar of her change of address in 2006 and the court takes judicial notice that the Oregon State Bar Director, a directly available to husband, in 2007 and 2008 contained wife's then-attorney's current office address.

The court concludes that husband did not timely serve wife with a copy of the notice of appeal and grants wife's motion to dismiss on that ground.

Appeal dismissed.

June 20, 2008
DATE

/s/ James W. Nass
James W. Nass, Appellate Commissioner

c: Laura B. Rufolo
Harold S. Shepherd

DESIGNATION OF PREVAILING PARTY AND AWARD OF COSTS

Prevailing party: Respondent

[ ] No costs allowed

[X] Costs allowed, payable by Appellant

REPLIES SHOULD BE DIRECTED TO THE STATE COURT ADMINISTRATOR, RECORDS SECTION, SUPREME COURT BUILDING, 1163 STATE STREET, SALEM, OR 97301-2563

APPENDIX 3

IN THE COURT OF APPEALS OF THE STATE OF OREGON

In the Matter of the Marriage of

HAROLD S. SHEPHERD,
Petitioner-Appellant,

And

SUSAN H.F. SHEPHERD,
nka Susan Finch, aka Susan H. Finch,
Respondent-Respondent.

Multnomah County Circuit Court
970566040

A138344

ORDER DENYING RECONSIDERATION

REPLIES SHOULD BE DIRECTED TO THE STATE COURT ADMINISTRATOR, RECORDS SECTION, SUPREME COURT BUILDING, 1163 STATE STREET, SALEM, OR 97301-2563

ORDER DENYING RECONSIDERATION

On June 20, 2008, the court granted respondent's ("wife's") motion to dismiss this case due to lack of timely service of the notice of appeal. In so doing, the court found that the notice of appeal was received by wife's former attorney outside the time period allowed pursuant to ORS 19.240(2)(a). It further concluded that appellant ("husband") had been effectively notified of the new address because his former attorney was given notice and the case materials would have been forwarded to husband and included the proper address.

Husband has now petitioned for reconsideration. In support of his petition, he argues both factual and legal error in the original decision. However, review of his petition reveals no basis for reconsideration. As to husband's assertion of factual error, he has failed to point to any factual error of fact in the order.

Husband contents that, because his former attorney is not now his agent, notice of the new address and the former attorney's knowledge thereof

cannot be imputed to him. He is incorrect. The court in its order cited Fleishhacker v. Portland News Pub. Co. 158 Or 476, 487-88, 77 P2d 141 (193), for the proposition that husband's former attorney's knowledge is imputed to him. Although the attorney is no longer husband's agent, at the time the attorney received the information about the new address and utilized that information, he was an agent of the husband. The information provided to the attorney relevant to the case during the time and within the scope of his agency is imputed to husband. The fact that the agency relationship has ended means that information given to the attorney *now* would not result in the imputation of knowledge to husband. However, husband was properly put on notice as to information provided to his attorney during that attorney's representation.

Husband also argues that he was not required to serve the notice of appeal within 30 days. He asserts that service is complete upon mailing, and that timeliness of service is judged by the date on which the notice of appeal is sent in the manner permitted by statute and not the date it is received by an adverse party. Although, in general, it is

correct that "[u]nder our statutory scheme, the timeliness of service of a notice of appeal is tested by the date on which the notice of appeal is *mailed* in a manner permitted by statute * * * not by the date on which the responding party *receives* the notice of appeal[.]" *Mullens v. L.Q. Dev.*, 312 Or 599, 605, 825 P2d 1376 (1992), the court in *McCall v. Kulongoski*, 339 Or 186, 194-96, 118 P3d 256 (2005), stated, to be mailed as required by statute, the notice of appeal must be sent to the last known address of the adverse party or that party's attorney. The court has concluded that last known address of wife's former attorney is that attorney's current address, which husband's former attorney was given notice of and utilized during this case. Thus, because it was not sent as provided by statute, the notice of appeal was not effectively served when mailed. Additionally, it was not actually received by the adverse party until the 30-day period allowed for service has expired.

ORS 19.255(1) provides that "a notice of appeal must be served and filed within 30 days after the judgment appealed is entered in the register." ORS 19.270(2) states that the timely service of the notice of appeal on all parties in "jurisdictional and

may not be waived or extended[.]" Because the notice of appeal was not timely served on wife, and because service within the time limit prescribed by ORS 19.255 is jurisdictional, the court lacks jurisdiction and the appeal was properly dismissed.

The petition for reconsideration is denied.

Sep 23, 2008 /s/ *[signature not legible]*
DATE CHIEF JUDGE

c: Harold S. Shepherd
Laura B. Rufolo

Db/A138344ODRC080916

ORDER DENYING RECONSIDERATION

REPLIES SHOULD BE DIRECTED TO THE STATE COURT ADMINISTRATOR, RECORDS SECTION, SUPREME COURT BUILDING, 1163 STATE STREET, SALEM, OR 97301-2563

APPENDIX 4

SUPREME COURT COURT OF APPEALS

Office of Appellate Commissioner
Telephone: (503)986-5563
fax: (503)986-5560
e-mail jimnass@ojd.state.or.us

Supreme Court Building
1163 STATE STREET
SALEM OREGON 97301-2563

RECORDS SECTION
503-986-5555
Fax: 503-986-5560
TTY 503-9865561

November 12, 2008

Laura B. Rufolo
Johnson & Lechman-Su PC
516 SE Morrison Street, #1200
Portland, OR 97214

Harold S. Shepherd
P.O. Box 331
Moab, UT 84532

Re: *Shepherd and Shepherd*, A 138344

Ms. Rufolo and Mr. Shepherd,

On July 11, 2008, the court received Respondent's Petition for Attorney Fees and Request

for Findings Under ORAP 13.10(7). Petitioner/Appellant's Response to Respondent's Petition for Attorney Fees and Request for Findings Under ORAP 13.10(7) was filed on July 25, 2008. The court notes that appellant attached to his response the first page of an Order Confirming Debtors Chapter 13 Plan Following Contested Confirmation Hearing, signed June 16, 2008.

In light of the provisions of ORAP 8.20 along with 11 USC § 362, the court requires more information regarding the bankruptcy. Mr. Shepherd is therefore directed, within two weeks from the date of this letter, to advise the court of the current status of the bankruptcy proceeding as well as appellant's position regarding the effect of that proceeding on this appeal. In addition, complete copies of any orders of the bankruptcy court that may be pertinent to this case should be provided along with appellant's response to this inquiry. Ms. Rufolo may, within two weeks following the submission of appellant's response hereto, advise the court of respondent's position on the effect of the bankruptcy and whether this case should be held in abeyance pursuant to ORAP 8.20(1).

Thank you for your prompt attention to this matter.

Sincerely,

/s/*James W. Nass*

James W. Nass Appellate Commissioner

APPENDIX 5

IN THE COURT OF APPEALS OF THE STATE OF OREGON

In the Matter of the Marriage of

HAROLD S. SHEPHERD,
Petitioner-Appellant,

and

SUSAN H.F. SHEPHERD, nka Susan Finch, aka Susan H. Finch,
Respondent-Respondent.

Multnomah County Circuit Court
970566040

A138344

ORDER GRANTIN MOTION FOR EXTENSION OF TIME

REPLIES SHOULD BE DIRECTED TO THE STATE COURT ADMINISTRATOR, RECORDS SECTION, SUPREME COURT BUILDING, 1163 STATE STREET, SALEM, OR 97301-2563

ORDER GRANTING MOTION FOR EXTENSION OF TIME

Respondent has moved for an extension of time and relief from default to file the response to the court's letter. The motion is granted. The response to the court's letter is now due January 7, 2009.

Dec 16, 2008 — /s/ *James W. Nass*
DATE — James W. Nass, Appellate Commissioner

c: Harold S. Shepherd
Laura B. Rufolo
ab
12/16/2008

ORDER GRANTIN MOTION FOR EXTENSION OF TIME

APPENDIX 6

IN THE COURT OF APPEALS OF THE STATE OF OREGON

In the Matter of the Marriage of

HAROLD S. SHEPHERD,
Petitioner-Appellant,

and

SUSAN H.F. SHEPHERD, nka Susan Finch, aka Susan H. Finch,
Respondent-Respondent.

Multnomah County Circuit Court
970566040

A138344

ORDER 1

REPLIES SHOULD BE DIRECTED TO THE STATE COURT ADMINISTRATOR, RECORDS SECTION, SUPREME COURT BUILDING, 1163 STATE STREET, SALEM, OR 97301-2563

ORDER REQUEST TO STAY AND AWARDING ATTORNEY FEES AND COSTS

Before Wolheim, Presiding Judge, and Brewer, Chief Judge, and Schuman, Judge.

Husband filed a notice of appeal of the circuit court's Supplemental Judgment Re; Modification of Parenting Time (the judgment). Wife moved to dismiss for lack of jurisdiction, arguing that husband failed to properly serve her with the notice of appeal. We granted the motion to dismiss in June 2008 and denied husband's motion for reconsideration in September 2008. Wife filed a Petition for Attorney Fees and Request for Findings Under ORAP 13.107(7) (the petition) to which husband objects.

In early 2008, husband filed a chapter 13 bankruptcy petition. After becoming aware of this fact, the court requested the parties to advise us of their respenctive positions regarding the effect of husband's bankruptcy on this appeal. Husband argues that proceedings in this appeal are stayed under 11 USC § 362(a) by virtue of the filing of his chapter 13 bankruptcy petition. We disagree. Under

REPLIES SHOULD BE DIRECTED TO THE STATE COURT ADMINISTRATOR, RECORDS SECTION, SUPREME COURT BUILDING, 1163 STATE STREET, SALEM, OR 97301-2563

the current bankruptcy code, which was in effect when husband filed his petition, the filing of a bankruptcy petition does not stay the commencement or continuation of a civile action conce5ring child custody or visitation. 11 U.S.C. §362(b)(2)(A)(ii).[1] We denyhusband's request to stay wife's petition for attorney fees.

Wife petitions for attorney fees of 1,105.00 and expenses of $11.08 under ORS 107.105(5), which provides:

> "If an appeal is take from the judgment or other appealable order in a suit for annulment or dissolution of a marriage or for separation

---

[1] 11 U.S.C. § 362 states, in pertinent part:

"(b) The filing of a petition under section 301, 302 or 303 of this title, or of an application under section 5(a)(3) of the Securities Investor Protection Act of 1970, does not operate as a stay—

*****

"(2) under subsection (a)—

"(A) of the commencement or continuation of a civil action or proceeding—

*****

"(iii) concerning child custody or visitation[.]"

REPLIES SHOULD BE DIRECTED TO THE STATE COURT ADMINISTRATOR, RECORDS SECTION, SUPREME COURT BUILDING, 1163 STATE STREET, SALEM, OR 97301-2563

> and the appellate court awards costs and disbursements to a party, the court may also award to that party, as part of the costs, such additional sum of money as it my adjudge reasonable as an attorney fee on the appeal."

Husband objects to the petition for several reasons, including that fees are not appropriate under ORS 107.105(5) because the judgment was a judgment modifying parentin tim, not a dissolution. The distinction is not determinative. Fees may be awarded in this matter, because the judgment was entered *in* the parties' dissolution suit. An awared of attorney fees under ORS 107.105(5) is therefore approprate. Husband also arguest that granting attorney fees would violate his constitutional rights. The arguments raised by petitioner pertain to the dismissal of his appeal and are not relevant to the matter currently before the court. Finally, husband maintains that the fees requested are unreasonable. We disagree. The time spent by wife's attorney and the hourly rate charged are reasonable. Therefore, we overrule husband's objections and exercise our discretion to award attorney fees of 1,105.00 and expenses of $11.08.

REPLIES SHOULD BE DIRECTED TO THE STATE COURT ADMINISTRATOR, RECORDS SECTION, SUPREME COURT BUILDING, 1163 STATE STREET, SALEM, OR 97301-2563

Attorney fees and expenses awarded in the total amount of $1,116.08.

Mar -2, 2009 /s/ *Robert Wollheim*
DATE Robert Wollheim, Presiding Judge

c: Harold S. Shepherd
Laura B. Rufolo

TM/dr-02/12/2009

REPLIES SHOULD BE DIRECTED TO THE STATE COURT ADMINISTRATOR, RECORDS SECTION, SUPREME COURT BUILDING, 1163 STATE STREET, SALEM, OR 97301-2563

APPENDIX 7

IN THE COURT OF APPEALS OF THE STATE OF OREGON

In the Matter of the Marriage of

HAROLD S. SHEPHERD,
Petitioner-Appellant,

And

SUSAN H.F. SHEPHERD, nka Susan Finch, aka Susan H. Finch,
Respondent-Respondent.

Multnomah County Circuit Court
970566040

A138344

Appellate Judgment and Supplemental Judgment

REPLIES SHOULD BE DIRECTED TO THE STATE COURT ADMINISTRATOR, RECORDS SECTION, SUPREME COURT BUILDING, 1163 STATE STREET, SALEM, OR 97301-2563

APPELLATE JUDGMENT and SUPPLEMENTAL JUDGEMENT

Respondent ("wife") moves to dismiss the appeal of appellant ("husband") for lack of jurisdiction on the ground that husband failed timely to serve wife with the notice of appeal. ORS 19.240(2)(a) requires such service; ORS 19.270(2)(a) makes such service jurisdictional.

It is undisputed that husband served his notice of appeal by mail addressed to wife's then-attorney at the attorney's former address, an address from which she had moved in October 2006. In a reply to husband's response to her motion to dismiss, wife produced evidence that wife's then-attorney actually received the notice of appeal on the 31st day after the date of entry of judgment.

By letter, husband appears to suggest that the court should disregard that evidence because the Oregon Rules of Appellate Procedure do not provide for filing replies to responses to motions. The Oregon Supreme Court and Court of Appeals have not provided in the Oregon Rules of Appellate Procedure

for filing replies to responses to motions because the appellate courts do not want to encourage the filing of replies merely because the rules would provide parties with the opportunity to do so. However, it is the practice of the appellate courts to consider replies, regardless of when field, if received by the court in time to be considered by the court before deciding the motion. Therefore, the court has considered wife's reply and the declaration of wife's former attorney attached thereto. *See, for example, Murrieta v. Brewster*, 328 Or 434, 439, 981 P2d 330 (199) (Supreme Court reversed Court of Appeals dismissal of appeal based on evidence received by the Court of Appeals so belatedly that the Court of Appeals may not have been aware of it when the appeal was dismissed.)

Based on wife's reply, the court determines that wife's former attorney did not actually receive her service copy of the notice of appeal until the 31st day after the date of entry of judgment. As such, wife's then-attorney received her service copy untimely. Nevertheless, husband contends that, under ORCP 9, he timely served wife's attorney by

mail because he mailed the notice of appeal to the last address known to him of wife's then-attorney.

The court interprets "last known address" as the address that the party undertaking service knew, or should have discovered if the party had undertaken a reasonable investigation. Husband's former attorney clearly was aware of wife's attorney's then current address. Counsel's knowledge is imputed to husband. *Fleishhacker v. Portland News Pub. Co.* 158 Or 476, 487-88, 77 P2d 141 (1938). Moreover, it is more likely than not that husband's former attorney forwarded to husband copies of materials that were placed in the attorney's file, either as those materials were filed or, at the latest, when husband undertook to represent himself on appeal. The court infers that, had husband undertaken an inspection of those materials, he would have discovered wife's then-attorney's current office address. Lastly, wife's attorney notified the Oregon State Bar of her change of address in 2006 and the court takes judicial notice that the Oregon State Bar Director, a directly available to husband, in 2007 and 2008 contained wife's then-attorney's current office address.

Appellate Judgment and Supplemental Judgment

The court concludes that husband did not timely serve wife with a copy of the notice of appeal and grants wife's motion to dismiss on that ground.

Appeal dismissed.

June 20, 2008
DATE

/s/ James W. Nass
James W. Nass, Appellate Commissioner

c: Laura B. Rufolo
Harold S. Shepherd

MONEY AWARD

JUDGMENT #1

Creditor(s): Susan H.F. Shepherd
Attorney: Laura B. Rufolo, 516 SE Morrison St Ste 1200, Portland OR 97214
Debtor(s): Harold S. Shepherd

Appellate Judgment and Supplemental Judgment

Attorney: Harold S. Shepherd
Attorney Fees: $2,965.00
Costs: $44.98
Total Amount: $3,009.98
Interest: Simple 9% per annum, from the date of this appellate judgment.

Appellate Judgment COURT OF APPEALS
Effective Date: August 13, 2009 (seal)

APPENDIX 8

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

LARRY BOWOTO et al.,

Plaintiffs,

v.

CHEVRON CORPORATION et al,

Defendants.

_____/

No. C 99-02506 SI

ORDER DENYING BILL OF COSTS

Defendants have filed a bill of costs. A hearing on the bill of costs is scheduled for April 24, 2009, Pursuant to Civil Local Rule 7-1(b), the Court finds this matter appropriate for resolution without oral argument and VACATES the hearing. Having considered the papers submitted, and for good cause shown, the Court rules as follows.

DISCUSSION

This case arose from events on an oil platform in the Niger Delta of Nigeria in 1998. On December 1, 2008, after a four-week trial and eight and a half

years of litigation, the jury returned a verdict for defendants on all claims. Defendants filed a bill of costs on December 16, 2008 [Docket No. 2274] seeking $485, 159.15 in costs. Plaintiffs oppose the bill of costs.

Federal Rule of Civil Procedure 54(d)(1) provides, in relegant part, "costs-other than attorney's fees- should be allowed to the prevailing party." See Fed. R. Civ. Pro. 54(d)(1). "Rule 54(d) creates a presumption in favor of awarding costs to prevailing parties, and it is incumbent upon the losing party to demonstrate whcy the costs should not be awarded." Stanley v. Univ. of S. Cal., 178 F.3d 1069, 1079 (9th Cir. 1999). The "requirment that a district court give reasons for denying costs is, in essence, a... (p. 1)

The Court does not have specific evidence about the economic circumstances of the former plaintiffs, the evidence presented at trial was sufficient to establish a presumption that these individuals, who are also villages in the same region as the trial plaintiffs, are indigent.

The Court also finds that assessing costs against the form plaintiffs would have a chilling effect on future human rights litigation. Although defendants imply that the violuntary dimissal arc evidence of bad faith, and it is certainly not uncommon for plaintiffs to dismiss individual claims, or even whole cases, once they have had an

opportunity to fully evaluate what discovery has revealed about their cases. In an internation human rights case such as this, where the opportuntities for misunderstanding form cross-cultural differences, language barriers and technological limitations abound, complete fact finding prior to the fiolnig of a complaint may not be possible. Courts should not discourage plaintiffs from dismissing their claims when it is prudent to do so.

Finally, the Court finds that the former plaintiffs' claims were just as complex as the claims that proceeded to trial.

For these reasons, the Court that costs should not be assessed against the former plaintiffs.

I. CONCLUSION

For the foregoing reasons and good cause shown, the Court DENIES defendants' bill of costs.

IT IS SO ORDERED.

Dated April 22, 2009 */s/ Susan Illston*
Susan Illston
United States District Judge